No. 253.

Brf. of Richardson & Cooper for P. in E.

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# In the Supreme Court of the United States.

## OCTOBER TERM, 1899.

ADA F. McDONNELL, Plaintiff in Error,

No. 253. vs.

LLELLYN JORDAN, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR PLAINTIFF IN ERROR, ON MOTION TO DISMISS, MADE BY DEFENDANT IN ERROR.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Plaintiff in Error.

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Statement of Facts and Brief, on Behalf of Plaintiff in Error, in Reply to the Motion made by Defandant in Error, to Dismiss or Affirm the Writ of Error.

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Matt e Lee Fennell, a resident citizen of the county of Madison, State of Alabama, died on the 5th day of February, 1897, leaving a will executed by her on December 17th, 1895, in which she devised all her property to her mother, Mrs. M. E. Fennell, during her natural lifetime, and on the death of her mother the property to go to Llewellyn Jordan. In the will, Walter E. Jordan, a resident citizen of Madison county, and Llewellyn Jordan, a resident citizen of the state of Mississippi were nominated as execu-

tors without bond. Mrs. Fennell, the original and first devisee under the will died on the————day of————, 1896. On the 9th day of February, 1897, Walter E. Jordon, one of the named executors filed his petition in the Probate Court of Mad son county, Alabama, to have the will of Mattie Lee Fennell admitted to probate. On the 11th day of February, 1897, Ada F. McDonnell, the sister and only heir at law of Mattie Lee Fennell, filed in said Probate Court her written contest of the alleged will, based on certain grounds and demanding a trial by jury.

On the first day of April, 1897, a jury was empannelled in the Probate Court to try said contest, and an issue was then made up by said Court, between Walter E. Jordan as plaintiff and Ada F McDonnell as defendant, and the trial entered upon. On the 15th day of April, 1897, after having considered the case, the jury came into Court and reported that they were unable to agree upon a verdict; thereupon the jury was discharged and the cause continued.

On the 28th day of May, 1897, Walter E. Jordan, the proponent and plaintiff in the cause in the Probate Court, filed his petition in the Probate Court, asking that Llewellyn Jordan, who was named as a co-executor, be made a party defendant in the cause then pending in the Probate Court. On the 3rd day of August, 1897, the Probate Court denied the petition or proposed amendment to make Llewellyn Jordan a defendant.

On August 4th, 1897, Llewellyn Jordan, filed in the Probate Court an answer to the contest of Ada F. McDonnell—called an intervening petition. On the 4th day of August, 1897, the Probate Court entered an order dismissing or striking from the file the answer or intervening petition of Llewellyn Jordan.

On August 5th, 1897, Walter E. Jordan, the proponent of the will, filed in the Probate Court, a renunciation of his right to have letters testamentary issued to him and asked that the same be issued to Llewellyn Jordan. On the 12th day of August, 1897, Llewelly Jordan filled his petition in the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, to remove to said Federal Court the matter of the proceedings to probate and contest the will of Mattie Lee Fennell, then

pending in the Probate Court of Madison County, Alabama, on the ground that from prejudice and local influence he could not obtain justice in the Probate Court or in any other State Court. Without notice, the cause was removed by order, August 12th, 1897, from the Probate Court of Madison County, Alabama, to the United States Court for the Northern Division of the Northern District of Alabama.

Plaintiff in Error filed a motion in the United States Circuit Court for the Northern Division of the Northern District of Alabama to remand said cause to the Probate Court of Madison county, Ala.

Plaintiff in Error, also, filed in the Circuit Court, a motion to dismiss, and strike from the file, the petition of the Defendant in Error, for the removal of the probate proceeding, from the State Court, to said Circuit Court.

The trial Court maintained jurisdiction of the cause, and accordingly overruled each of said motions.

The Defendant in Error now moves this Court to dismiss the Writ of Error, or affirm the judgment of the Court below; and this motion embraces in effect two propositions:

1. That no question of jurisdiction has been certified to this Court and that this Court plainly has no jurisdiction of the cause.

2. That the questions submitted by the Plaintiff in Error, can be presented only by a Bill of Exceptions.

First. By the express terms of section 5 of the Act of March 3, 1891, writs of error may be taken from the existing circuit courts direct to the Supreme Court "in any case in which the jurisdiction of the Court is in issue." The jurisdiction of the Court is the issue presented. The trial judge held that the Circuit Court had jurisdiction of the cause, and he accordingly proceeded to have the same heard and determined. We think it very manifest that the Court had no jurisdiction of the case. The petition for removal to the Circuit Court of the United States, carries with it as an exhibit, the record of the proceedings of the State Probate Court.

The proceedings in the State Court, sought the probate of the will of Mattie Lee Fennell, deceased. The cause having been removed to the Federal Court, the purpose of the original proceedings was not changed, but remained the same,—an effort to probate the will. The Plaintiff in Error met this question at the threshold, denying that the Circuit Court had jurisdiction in the premises. The cases, hereafter cited, we submit, are in thorough accord with our view, and show very manifestly that the Circuit Court was without jurisdiction. The Act of Congress was designed to meet just such cases, and, therefore, the Writ of Error is sued out direct to this Court.

Second. The contention that the question must be presented by a Bill of Exceptions, is erroneous. The question arises upon the record, and could not be presented by a Bill of Exceptions. It is not a case, where a Court is alleged to have erred in its instructions to the jury,—no error is based upon the ruling of the Court in admitting or rejecting testimony.

The record affirmatively shows that the Circuit Court was without jurisdiction, and this being made clearly to appear, this Court will reverse, with instructions to remand the case to the State Court.

This doctrine was early announced by this Court, and has since been strictly maintained.

In Slacum v. Pomeroy, 6 Cranch, 221 (225), it was held, that it was not too late to allege as error, in this Court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the Court below.

So, in Garland v. Davis, 4 Howard, 121 (143), it is said to be the duty of the Court to give judgment of the whole record, and not merely on the points stated by counsel.

To the same effect, we find in Bennett v. Butterworth, 11 Howard 669 (676) "as these errors are patent upon the record, they are open to revision here, without any motion in arrest of judgment, or exception taken in the District Court." Suydan v. Williamson, 20 Howard 427 (433), states the rule in similar language, showing that it is wholly unnecessary to present the question by Bill of Exceptions, or in any other manner, when the error is apparent in the record.

In fact, it has grown to be elementary law, that this Court, will search the record to ascertain whether it has jurisdiction, whether or not the question is presented. No consent can waive it, and no agreement can create it.

Mansfield Railway Co., vs. Swan, 111 U. S., 379, (382).
Grace vs. American Insurence Co., 109 U. S., 278, (283).
Blacklock vs. Small, 127 U. S., 96.
Cameron vs. Hodges, 127 U. S., 322.
Metcalf vs. Watertown, 128 U. S., 586.
Everhart vs. Huntsville Female College, 120 U. S., 223.
Robertson vs. Cease, 97 U. S., 646.

This Court, in Morris vs. Gilmer, 129 U. S., 315 (325), has said: "But if the record discloses a controversy of which the Court cannot properly take cognizance, its duty is to proceed no further, and dismiss the suit; and, its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error, which this Court, upon its own motion, will correct, when the case is brought here for review."

In said cause, it is further stated, the Statute does not prescribe any particular mode in which such fact may be brought to the attention of the Court; and whether the Circuit Court has, or has not jurisdiction is a question which this Court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits.

A motion to strike from the file a demurrer in itself a part of the pleadings in the cause, constitutes a part of the record proper of the primary court, and must be brought here as a part of the transcript of that record, and not as a mere statement of the presiding Judge embodied in a bill of exceptions.

Powell vs. Henry, 96 Ala., 412.

It is a general rule of appellate procedure that a bill of exceptions is useless, and indeed none should be brought up to the Appellate Court, where all the facts constituting the alleged error appear on the face of the record proper.

3 Ency. Pl. and Pr., p. 404.

This rule applies to motions founded on facts apparent of record, as a motion in arrest of judgment.

3 Ency. Pl. and Pr., p. 408.

Baker vs. People, 105, 111., 452.

The motion to strike, and the motion to remand, is based upon matter apparent upon the record, and is scarcely different from a demurrer, upon other facts, calling in question the sufficiency of the petition.

Sivoly vs. Scott, 56 Ala., 555.

Batchelder vs. Batchelder, 2 Allen, 105.

Raymond vs. Rhodes, 135 Mass., 337.

Petty vs. Dill, 53 Ala., 641.

Exparte Knight, 61 Ala., 482.

The Alabama cases, cited by the defendant in error, refer to motions, based upon facts aliunde the record.

It would, therefore, appear quite clear that a Bill of Exceptions is not only unecessary, but that the question of jurisdiction can only be presented by the record of the proceedings.

The Defendant in Error, in argument, asserts that the certificate of jusisdictional questions was not made during the term of the Court. The record affirmatively shows that this pretension is not true as a matter of fact. The certificate bears date, November 8, 1898. (Recorded p. 54.) The Court adjourned on the 16th day of March, 1899. (Record, p. 61.) The question now presented, was for all practical purposes, settled against the Defendant in Error, in his motion at the last term of this Court, for a certiorari. Manifestly, for the purposes of this latter named motion, the Defendant in Error, requested the trial Judge, to endorse the day the certificate was actually signed. This endorsement was made on the 4th day of April, 1899. The certificate was actually signed, in term time,—before adjournment of the term. There is no limitation of the term, and a term only expires, when another begins. No good reason can be assigned, why the Judge may not hold cases open, to expedite its business, and try the same either at Birmingham or Huntsville, at such time as he may appoint. He has this power—there is no statute against it.

This Court will take judicial notice of the terms of Court, and the place of holding the same. The term at Huntsville commences on the first Monday in April, and this Court will take judicial notice of the fact, that the 4th day of April, 1899, was subsequent to the commencement of another term. The April Term convened by law on the 3rd day of April, 1899.

We submit that this endorsement made by the trial Judge on the 4th day of April, 1899, is not material. If it were material, the Judge would be absolutely without any power to impugn the record, which, at a former term, he had made for this Court. He had no intention of impeaching the record, by subsequent action, regarding it evidently as not affecting the rights of the Plaintiff in Error. The endorsement of April 4, 1899, if a judicial action, is void.

The trial was concluded on the 8th day of November, 1898. During the trial, the questions of jurisdiction were necessarily the subject of controversy. The questions of jurisdiction to be certified to this Court, were then made. The fact that the certificate was signed on the 15th day of March, 1899, instead of the 8th day of November, 1898, as the record recites. (Record, p. 54,) is in keeping with the common practice of the Court. The action of the Court may be carried within its breast during the entire term. It is not an uncommon thing to sign Executions, Citations and other proceedings, at the close of the term,—otherwise, it would be necessary to arrange all such proceedings before another case could be called for trial, thus blocking the docket, consuming the time of the Court, and causing an actual defeat in the administration of justice.

Birmingham and Huntsville are in the same District,—the Divisions of the District only are different. The Judge of the one, is the Judge of the other. Each place is within the jurisdiction, and the one as much as the other. It is not a case where the Judge acts without his jurisdiction,—in another State.

Under the provisions of Section 562 of the Revised Statutes, when the Court is held in more than one place in the District, and the place of keeping the records is not especially provided by law,

they may be kept at either of the places, as the Court may direct.

We submit that the motion to dismiss, if it were meritorious, comes too late. An appearance has been entered,—a motion for a certiorari has been made by Defendant in Error, and overruled by this Court.

United States vs. Armego, 131 U. S.
2 Foster's Practice, p. 1062.

Passing from the effort of the Defendant Error, to defeat the hearing of the cause, on the jurisdictional question,—the real merits of the controversy,—the Court will readily discover, that the Defendant in Error is mistaken in the assertion that no jurisdictional question is presented. Every artery of the case pulstates with the flow of jurisdictional matter. At all stages, the Plaintiff in Error, is insisting that the Circuit Court is without jurisdiction to hear the cause,—that it has no power to probate a will; and this primary question, the Plaintiff in Error, has been driven to bring this Court, although so often decided in accordance with the contention of the Plaintiff in Error.

The proceeding in the Probate Court of Madison County, Alabama, was to establish and probate the will of Mattie Lee Fennell, and such a proceeding is not a "suit of a civil nature, at law or in equity," and cannot be removed to a Federal Court. A Federal Court has no jurisdiction to admit a will to probate.

Dillon on Removal Causes, Sec. 42 (Note).
Frazer vs. Jennison, 106 U. S. 191.
Broderick's Will, 21 Wallace 503.
In re Frazer Case, 9 Fed. Cases, No. 5068, p. 729.
Reed vs. Reed, 31 Fed. Rep. 49.
In re Cilley 58 Fed. Rep. 977.
In re Foley 76 Fed. Rep. 390.
In re Foley 80 Fed. Rep. 949.
Gaines vs. Fuentes 92 U. S. 10.
Ellis vs. Davis 109 U. S. 485.
Byers vs. McAuley 149 U. S. 620.
Turner vs. Tarbet, 9th Peters 174.
Fouvergne vs. New Orleans, 18 Howard 470.

Frazer vs. Jennison, 106 U. S. 191.

In Re Frazer, 7 cent, Law Journal 227.

The petition for removal under the Act of Congress 1887-88, applies only to a defendant. The Defendant in Error was not a defendent in the cause pending in the Probate Court.

Section 4287 of the Code of Alabama (1896,) reads of follows: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who if the testator had died, intestate would have been a heir or distributee of his estate. by filing in the Court where it is offered for probate, allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objection thereto; and thereupon an issue must be made up under the direction of the Court between the party making the application as plaintiff and the party contesting the validity of the will as defendant, and such issue must on the application of either party be tried by a jury."

In thus making up this issue, Walter E. Jordan, the proponent, become the plaintiff (not the defendant,) and Ada F. McDonnell, became the defendant (not the plaintiff.)

The present Defendant in Error, recognizing that he could not remove the cause, to Federal Court, if he was plaintiff, sought to inject himself into the State Probate Court, as a defendant, although his interest was directly antagonistic to the real defendant. If the Defendant in Error, had been permitted to intervene in the State Court as a defendant, the anomalous situation would have arisen, that the party claiming under, and the party claiming against the will, were both defendants; and when Walter E. Jordan, renounced his right to serve as Executor, the case was left without a plaintiff.

The application of Walter E. Jordan to make Llewellyn Jordan, a party defendant was denied by the Court, and the action of the Court was correct, because the Statute authorized no such intervention, the proponent, or plaintiff, representing the interests of Llewellyn Jordan, and because, under no circumstances, could he be made a defendant.

The proponent sought this forum,—the only forum for the probate of this will.

Kumpe vs. Coons, 63 Ala., 448 (455.)

The Record discloses the fact that the petition to probate the will was filed on the 9th day of February, 1897, in the Probate Court by W. E. Jordon, (Trans. p. p. 11 and 30), Ada F. McDonnell filed in the Probate Court her written contest of the will on the 11th of February, 1897, and thereupon an issue was made up, under the direction of the Court, between W. E. Jordan as plaintiff, and Ada F. McDonnell as defendant. (Trans. p. p. 13 and 22.)

The Record affimatively discloses the fact that W. E. Jordan, Proponent, filed his petition in the Probate Court asking that the Appellee, Llewellyn Jordan, be made a party defendent to the proceedings in the Probate Court. (Trans. p. p. 16 and 35.) The Record also shows that the Probate Court on August 3rd, 1897, denied the petion to make Llewellyn Jordan a defendant, (Trans. p. p. 17 and and 36.

The Record shows that on the 4th day of August, 1897, Llewellyn Jordan filed in the Probate Court a paper purporting to be an answer to the contest of Ada F. McDonnell, (Trans. p. p. 18 and 36.) The Transcript erroneously shows that the answer of Llewellyn Jordan was dated April 4th, 1897. The Record from the Probate appears twice in the Transcript in this cause. The answer of Llewellyn Jordan, appears in each of the Probate Transcripts as filed August 4th, 1897, (Trans. p. p. 18 and 36.)

This answer was filed with the affidavit of S. S. Pleasants as an "Exhibit," which was sworn to August 4th 1896, (Trans. p. p. 18 and 36.) The answer also appears in the Transcript from the Circuit Court of the United States with affidavit of S. S. Pleasants as an "Exhibit" August 4th, 1897, and marked "filed August 4th, 1897" in Probate Court, (Trans. p. p. 8, 9, and 10.) It is therefore manifest that dating the answer "April 4th, 1897" is a clerical error.

The Record shows that said answer or petition of intervention of Llewellyn Jordan, the Defendant in Error in this cause was improper and without authority filed in the Probate Court and was properly stricken from the files, (Trans. p. p. 19 and 37.)

The Record next shows that W. E. Jordan, the Proponent, on August 5th, 1897, renounced his right to have letters testamentary

issued to him, (Trans. p. p 20 and 38.)

The Record shows that the Defendant in Error was not a defendant at the commencement of the suit; that he was not a defendant in the cause then pending in the Probate Court at the time he filed his petition in the National Court for removal of the cause from the State Court.

Diversity of citizenship with the parties must exist at the time of the commencement of the action, and also at the time of the filing of the petition for the removal to the United States Circuit Court. It cannot be contended that Defendant in Error was a defendant at any time in the proceedings in the Probate Court. The contrary appears affirmatively from each of the Transcripts of the Probate Court in the Record of this cause.

Jackson vs. Allen, 132 U. S. 27.
Graves vs. Corbin, 132 U. S. 571.
Stevens vs. Nichols, 130 U. S. 230.
Fitzgerald vs. M. P. R. R. Co., 45 Fed. Rep. 812.
Grand Trunk R. R. Co., vs. Mitchell, 59 Fed. Rep. 727.

There is no law in Alabama, authorizing Llewellyn Jordan to be made a party to the probate proceeding. The question was presented to a Court of competent jurisdiction, and its adverse holding remains unreversed, and notwithstanding, the fact that he was elimated from the case, by this judgment of the Probate Court, he filed his petition in the Circuit Court of the United States, to remove a proceeding from the State Court, to which he was not a party.

The right of removal cannot be created by the introduction or intervention of new parties, whose interests were represented by a party previously in the record. Such party so far as removal is concerned is subject to all the disabilities existing at the time of commencement of the proceedings.

In Cabee vs. Ellis, 110 U. S. 389 the Court said:

"The application of an intervenor to have his rights settled in a suit can be entertained only as an incident to the original controversy, and whatever would bar a removal of suit before he intervened will bar him afterwards even although by his intervention he

may have raised a separate controversy."

Edrington vs. Jefferson, 111 U. S., 770.

Dillons Removal of Causes, Sec. 19, p. 111.

H. & Y. R. R. Co., vs. Shirley, 111 U. S., 358.

Hokes vs. Burns, 40 Fed. Rep. 33.

Hack, et al. vs. Chicago & G. S. R. R. Co., et al. 23 Fed. Rep. 356.

It is a patent from the record that W. E. Jordan, the Proponent, in his application to make the appellee Llewellyn Jordan, a defendant, and the renunciation that he made to have letters testamentary issued to him, was all done for the purpose of arranging the parties, so as to give jurisdiction to the Federal Court. But jurisdiction in the National Courts cannot be created by withdrawal or substitution or parties. It must exist in the due and regular course of litigation.

Farmers and Merchants National Bank vs. Schuster 86 Fed. Rep. 171.

Railway Co., vs. Shirley, 111 U. S., 358-361.

Railway Co., vs. Daughtry, 138 U. S., 298.

Fle'cher vs. Hamlett, 116 U. S., 408.

Burnham vs. First National Bank, 53 Fed. Rep. 163.

Jefferson vs. Driver, 117 U. S., 272.

Grand Trunk R. R. Co., vs. Mitchell, 59th Fed. Rep. 727.

Fox vs. Southern R. R. Co., 80 Fed. Rep. 945.

Walker et als. vs. Richards, et als. 55 Fed. Rep. 129.

Martin, Admr. vs. R. R. Co., 151 U. S., 673.

Stevens vs. Nichols, 130 U. S., 230.

Goldey vs. Morning News, 156 U. S., 418-24.

Edrington vs. Jefferson, (Supra.)

Hokes vs. Burns, (Supra.)

Hanrick vs. Hanrick, 153 U. S., 197.

Proceedings to admit a will to probate is not a seperate, but a single controversy and is therefore not removable.

Anderson vs. Appleton, 32 Fed. Rep. 855.

Reed vs. Reed, 31st Fed. Rep. 49.

Frazer vs. Jennison, 106 U. S., 191.
In Re Foely, 80 Fed. Rep. 949.
Watson vs. Asbury Co., 73 Fed. Rep. 1.
Robbins vs. Ellenberber, 71 Fed. Rep. 4.
In Re The Jarnuke Co., 69 Fed. Rep. 161.
Dillion's Removal of Cases, (5 ed) Sec. 44.
In Re Frazer, 9 Fed. Cas. Nos 5068, 729.

Statute of Alabama, regulating the jurisdiction of Probate Courts. The execution and probate of wills, in force (1896) at the time the petition to probate the Will of Mattie Lee Fennell was filed in Probate Court, Madison County, Alabama: Section 3363 "Courts of Probate have in the cases defined by law, original jurisdiction of, 1. "The Probate of Wills."

4263. (Code Ala.,) "Wills to be in writing—How signed and attested."

"No Will is effectual to pass real or personal property, except in the cases hereinafter provided for, unless the same is in writing, signed by the testator or some person in his presence, and by his direction and attested by at least two witnesses who must subscribe their names thereto in the presence of the testator."

Sec. 4172. "Who may have the Will probated."

"Upon the death of a testator, any executor, devisee or legatee named in the will or any person interested in the estate, may have the will proved before the proper Probate Court."

Sec. 4273. "In what Court will to be proved. '

"Wills must be proved in the several Probate Courts as follows: First,—when the testator at the time of his death was an inhabitant of the county, the Probate Court of such county."

Sec. 4276. "Mode of proving wills not nuncupative."

"Wills offered for probate except nuncupative wills must be proved by one or more of the subscribing witnesses, or if they be dead, insane or out of the State, or have become incompetent since the attestation, then by the proof of the handwriting of the testator, and that of at least one of the witnesses to the will."

Sec. 4279. "Testimony to be recorded with the will."

"If it appears on the proof taken before the Judge of Probate, that the will was duly executed, the testimony of the witnesses must be reduced to writing by him, signed by the witnesses and with the will recorded in a book provided for that purpose."

Sec. 4280. "Certificate endorsed on will; contents."

"Every will so proved, must have a certificate endorsed thereon, setting forth in substance, that such will has been duly proved and recorded with the proof, specifying also the date of probate the book, in and page or pages on which it is recorded, which endorsement must be signed by such Judge of Probate."

McCutcheon vs. Loggins, 109 Ala. 462.
Kumpe vs. Coons, 63 Ala. 448.
Matthews vs. Sprague, 16 Fed. Cases 9278. page 1103.
Adden vs. Goodman, 77 Ala., 521.
Dickey vs. Vann, 81 Ala. 425-430.

In the strained effort to give the National Courts jurisdiction the petition for removal states: "The said will is duly probated" by by the affidavit of S. S. Pleasants; said will was filed in said "Probate Court for probate in common form and is so probated." (Transcript, pape 2, 18 and 36.)

We respectfully refer the Court to case of Acklen vs. Goodman, 77 Ala. 521.

The will of Mattie Lee Fennell was never probated in any form. The affidavit of the attesting witness, S. S. Pleasants, was not a probate of the will. A will can only become probated through a judicial ascertainment by a Court of competent jurisdiction. The affidavit of an attesting witness, can never dispense with the judicial act of the Court. When a will has thus been verified, or otherwise established under the statute, and when it has been judicially determined to be the will of the testator, it then becomes probated in common form. The present record discloses that the case had not reached this point, when the petition for removal was filed. The record does not contain a certificate, setting forth that such will has been duly proved and recorded, as required by Section 4280 of the Code of Alabama. The cause had not so far pro-

gressed,—the petition for removal arrested the proceeding, and removed it to the Circuit Court, where this issue was the matter of litigation. A contest as to the validity of a will, does not become a suit in solemn form, until the will has been so probated in the Court of Probate and until a proceeding in the Chancery Court has been commenced, as provided by Section 4296 of the Alabama Code. This latter section, provides the remedy for a probate as in solemn form.

Knox vs. Paull, 95 Ala., 505 (509.)
Matthews vs. Forniss, 91 Ala., 157.
Johnston vs. Glasscock, 2 Ala., 218.
Lyons vs. Campbell, 88 Ala., 462.

Thus, we see very clearly, that the title of the devisee must first be established by a decree of the Probate Court. If the heir desires to contest the probate in solemn form, a Bill in Equity, as provided by Section 2598, is the method of procedure, thus superseding the common law practice of an action of ejectment, wherein the devisee could defend under the will as a muniment of title, showing its validity and due execution.

We submit, therefore, that it is not possible for the Defendant in Error, to avoid his position as plaintiff in the cause, if he has any position whatever,—just where the statute places him. Seeking the privileges of the statute, he cannot deny its requirements.

There are other cogent reasons, why the Circuit Court did not have jurisdiction of the cause.

The petition for the removal of the case at bar, from the Probate Court of Madison County, Alabama, to the Circuit Court of the United States for the Northern District of Alabama, was brought under the last clause of Section 2 of the Act of Congress, approved August 13th, 1888, on account of "prejudice or local influence."

Supplement Revised Statutes U. S., 611-613.

The Court erred in refusing to grant motion to remand. (Transcript, p. p 40 and 50.) The manifest purpose of the Congress in Acts of 1887-88 was to restrain the volume of litigation pouring into the Federal Courts.

Fisk vs. Hinare 142 U. S., p. 459.
Shaw vs. Quincy Ins. Co. 133 U. S., p. 315.
In re Cilley, 58 Fed. Rep., 980.
Hanrick vs. Hanrick 153 U. S., 197.
Missouri R. R. vs. Fitzgerald 160 U. S., 585.
Fox vs. Southern R. R. Co., 80 Fed. Rep. 945.
Martin vs. R. R. Co., 151 U. S. 673.
In re Pennsylvania Co., 137 U. S. 451.

The Appellant contends that the United States Circuit Court was without jurisdiction, and the motion to remand to the Probate Court of Madison County, Alabama, (Trans. p. p. 40 and 50) should have been granted, and for grounds of contention says:

First. The petition for removal to the U. S. Circuit Court was presented and filed in said Circuit Court after a trial of the cause in the Probate Court in Madison County, Alabama, and was therefore too late, and did not give jurisdiction to the Federal Court.

Second. The proceedings sought to be removed from the Probate Court of Madison County, Alabama, is a matter of probate jurisdiction and inquiry, and is not a "suit of a civil nature at law or equity," within the meaning of the Acts of Congress 1887-88, and a Federal Court has no original cognizance of such a proceeding nor can it acquire jurisdiction by removal.

Third. The Circuit Court of the United States, Northern Division, Northern District of Alabama, has no jurisdiction under the removal Acts of Congress 1887-88 to hear, try, determine or pass upon a proceeding to admit a will to probate.

Fourth. At the time of the filling of the petition in this cause for removal to the Circuit Court of the United States, there was no controversy in the Probate Court of Madison County, Alabama, between a citizen of the state of Alabama, and a citizen of another state, which was necessary to give a Federal Court jurisdiction.

Fifth. The Appellee in this cause, at the time of the signing of the petition for removal and making the affidavit, was not a defendant in any suit, proceeding or controversy in the Probate Court of

Madison County, Alabama, related to, connected with or concerning the matter of the probate or contest of the will of Mattie Lee Fennell, deceased, and under the provisions of the Acts 1887-88 a defendant only is entitled to remove a cause from a State Court to a Federal Court.

Sixth. The proceeding or action in the Probate Court of Madison county, Alabama, to establish and admit to probate the will of Mattie Lee Fennell, deceased, is not a seperate, but single controversy and its removal to a Federal Court is not authorized by the Acts of Congress 1887-88.

Seventh. The Probate Court of Madison county, Ala., is a court of record and has general, original and exclusive jurisdiction of the proceedings to establish and admit to probate a will, and at the time of the filling of the petition for removal, the Probate Court had taken cognizance of and was proceeding to hear and determine the cause at bar.

## THE PETITION FOR REMOVAL TOO LATE.

If Appellant's contention is right that the petition for removal from the Probate Court to the Circuit Court of the United States was filed after a trial of the cause had taken place in the Probate Court and mistrial entered, then under the settled construction given by the Federal Courts of the language of the Act of Congress 1888, viz: "At any time before the trial thereof" rhe petition for removal was filed too late, and the Federal Court had no jurisdiction, and there will be no necessity for this Honorable Court to enquire into other matters or questions presented in the record.

It affirmatively appears from the Record that on the first day of April, 1897, a jury was empannelled and sworn in the Probate Court of Madison county, Ala., to try the issues made up in the contest of the will of Mattie Lee Fennell, deceased, (Trans. p. p 15 aud 35.) On the 15th day of April, 1897, the jury reported to the Court that they had been unable to agree on a verdict. The Court discharged the jury, and continued the cause. (Trans. p. p. 16 and 35.

The petition for removal from the Probate Court of Madison County, to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, was presented and filed on the 12th day of August, 1897. (Trans. p. p. 1, 2, 3, 4 and 5.)

It was insisted by counsel for appellee in the lower court that the mistrial in the Probate Court did not bar the petition for removal and the lower court held that the petition for removal was filed "before the trial thereof." In effect that a mistrial was not a trial of the cause. Appellant contends that such is not the law. In the case of Fisk versus Henarie, 142 U. S. page 459, Chief Justice Fuller in rendering the opinion of this Honorable Court, where a petition for removal was filed after the cause had been tried three times in State Court, said:

"In view of the repeated decisions of this Court in exposition of the Acts of 1866, 1867 and 1875, it is not to be doubted that Congress recognizing the interpretation placed on the word "final" in connection in which it was used in the prior acts and the settled construction of the Acts of 1875, deliberately changed the language "at any time before the final hearing or trial of the suit," or at any time before the final hearing of the cause," to read "at any time before the trial thereof," as in the Act of 1875 which required the petition to be filed before or at the term at which the cause could first be tried and before the trial thereof." We are of opinion that the application for removal came too late."

In Farmers and Merchants National Bank of Waco vs. Schuster et al, 36 Federal Rep., page 161, decided in the Circuit Court of Appeals, Fifth Circuit, the first head note, reads: "After a cause has been tried in a State Court and a mistrial entered, it cannot be removed on account of local prejudice." The Judge rendering the opinion of the Court used this language:

"The petition for removal was presented and the removal allowed it will be perceived, after the case had been tried and mistrial entered in the State Court. The question as to the stage at which a case may be removed from a State Court to the

Circuit Court of the United States under the local prejudice clause of the Act of March 3rd, 1887, seems to have been fully settled by the Supreme Court in Fisk vs. Henarie, 142 U. S. 459-12 in which case the words "at any time before the trial thereof was construed, and its meaning settled."

Gregory vs. Boston Safe Deposit Co., 88 Fed. Rep. 3.
Young vs. Andes Ins. Co., Fed. Cases, Case 18, 151, p. 839.
Martin vs. B. & O. R. R. Co., 151 U. S. 687.
B. & O. R. R. Co. vs. Burns 174 U. S. 165.
Edrington vs. Jefferson, 111 U. S. 770.
Fox vs. Southern R. R. Co., 80 Fed. Rep. 945.
Ayers vs. Watson, 113 U. S. 594.
Guerney vs. Brunswick, 11 Fed. Cases, Case 5872, p. 117.
Alley vs. Note, 111 U. S. 472.
American Bible Society vs. Grove, 101 U. S. 610.
Holland vs. Chambers, 110 U. S. 59.
Babbett vs. Clark, 103 U. S. 606.
Myers vs. Swann, 107 U. S. 546.
Rosenthal vs. Coates, 148 U. S. 142.

The Statute of Alabama here referred to in connection with above authorities: Section 3371 of the Code of Alabama, 1896, viz: Sec. 3371, "Regular and Adjourned Terms, "When Court Always Open." "A Court of Probate must be held at the Court House of each county on the second Monday in each month, and the Judge may hold special or adjourned terms at any time whenever necessary for any special purpose."

Supplemental:

The record discloses the fact that the question of jurisdiction was presented prior to the certificate signed on Nov. 8th, 1898. (Record page 48. 49 and 50).

In re Lehigh Min. Co., 156 U. S., 322.
Shields v. Coleman, 157 U. S., 168.
United States v. Jahn, 155 U S., 109.
Interior Construction Co. v. Gibney, 160 U. S. 217.
Smith v. McKay, 161 U. S., 355.

Van Wagenen v. Sewall, 160 U. S., 369.

If this cause could thus be lifted from the Probate Court, without any probate of the will therein, may we not inquire what machinery of the Federal practice could carry it into effect, and administer it?

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1899.**

*No. 253.*

ADA F. McDONNELL, PLAINTIFF IN ERROR,

*vs.*

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

**Comparative Numbers of Sections of Codes of Alabama. Filed by leave of the Court.**

| Code 1886. | Code 1896. |
|---|---|
| Section 1989 | is section 4287. |
| Section 1966 | is section 4263. |
| Section 1975 | is section 4172. |
| Section 1976 | is section 4173. |
| Section 1979 | is section 4276. |
| Section 1982 | is section 4279. |
| Section 1983 | is section 4280. |
| Section 2000 | is section 4296. |

Section 2598 on page 15 of brief is an error and refers to section 4296 of the Code of 1896.

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